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A New Exception to the Exclusivity Provision of the North Carolina Workers' Compensation Act - Woodson v. Rowland

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A NEW EXCEPTION TO THE EXCLUSIVITY PROVISION OF THE NORTH CAROLINA WORKERS' COMPENSATION ACT — *Woodson v. Rowland*

INTRODUCTION

The case of *Woodson v. Rowland* presents the issue of whether the family of an injured employee may bring a civil action against the employer to recover damages for the death or injury of the employee, when coverage and compliance under the North Carolina Workers' Compensation Act (the Act) exist.[1] The opinion of the North Carolina Supreme Court in *Woodson*, decided on August 14, 1991, allows a worker's family to bring a civil suit against the employer to recover damages.[2] *Woodson* overruled previous case law which held that simultaneous pursuit of civil and workers' compensation claims is not allowed.[3]

Prior to *Woodson*, employers were immune from damage suits filed by their employees when coverage existed under the North Carolina Workers' Compensation Act.[4] However, employees were able to recover benefits under workers compensation without a showing of negligence on the part of the employer as the cause of their injuries.[5] Under *Woodson*, when an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees, an injured employee, or the personal representative of that employee, may pursue civil action against the employer.[6] Such civil actions will not be barred by the exclusivity provision of the Act.[7] The court held that it is was not inherently inconsistent to assert that the same injury to an employee was both a result of an intentional tort, and an accident under the Act.[8] This conclusion made both remedies available, and made the exclusivity provision of the Act unavailable to bar the

1. Woodson v. Rowland, 329 N.C. 334, 407 S.E.2d 224 (1991).
2. *Id.*
3. *Id.* at 349, 407 S.E.2d at 233.
4. Pleasant v. Johnson, 312 N.C. 710, 325 S.E.2d 244 (1985).
5. *Id.*
6. *Woodson*, 329 N.C. at 340-41, 407 S.E.2d at 228.
7. *Id.*
8. *Id.* at 340-41, 407 S.E.2d at 228.

civil action.[9] However, the decision does only allow one recovery by the employee, meaning the employee may not recover fully from both compensation under the Act and a civil action against the employer.[10]

THE CASE

Woodson v. Rowland concerned a wrongful death action arising from a work-related trench cave-in which resulted in the death of one of the workers, Thomas Alfred Sprouse.[11] One of the defendants, Pinnacle One Associates, (Pinnacle One), was the developer on the construction project.[12] Pinnacle One retained Davidson & Jones, Inc., (Davidson & Jones), as the general contractor, was also named as a defendant.[13] The defendant Morris Rowland Utility, Inc., (Rowland Utility) or (employer), was hired by Davidson & Jones to dig a sanitary sewer line for one aspect of the project.[14] The president and sole shareholder of Rowland Utility is defendant Neal Morris Rowland, (Morris Rowland). The decedent was an employee of Rowland Utility.[15]

Workers from both Rowland Utility and Davidson & Jones were digging trenches for the sewer lines on August 3, 1985.[16] There were two trench sites, one manned by Rowland Utility and the other by Davidson & Jones.[17] The foreman for Davidson & Jones would not allow his men to work in the trenches because they "were not sloped, shored or braced, and did not have a trench box," as required by the Occupational Safety and Health Act of North Carolina and the rules promulgated thereunder.[18] After the refusal to work by the foreman of Davidson & Jones, Morris Rowland procured a trench box for the Davidson Crew, but not for his own crew.[19] The following morning, August 4, 1985, only the Rowland Utility crew reported to the site and began work.[20] Morris

9. *Id.*
10. *Id.* at 341, 407 S.E.2d at 228.
11. *Id.*
12. *Id.* at 334, 407 S.E.2d at 225.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 335, 407 S.E.2d at 225.
18. *Id.*
19. *Id.*
20. *Id.*

Rowland was present at the site.[21] At 9:45 a.m., one side of the trench collapsed, completely burying Sprouse and partially burying the man closest to him.[22] The workers pulled out the man who was partially buried but could not dig out Sprouse for several hours and by the time they finished, he was dead.[23] The plaintiff and administrator of the decedent Sprouse's estate, Susie Mae Woodson, filed civil suits against Rowland Utility, Morris Rowland individually, Davidson & Jones, and Pinnacle One Associates.[24] The plaintiff also filed a Worker's Compensation claim with the specific request that the Industrial Commission not hear her case until the completion of the civil action.[25] The Commission complied with her request and the plaintiff has not received any compensation under the Act.[26]

The principle question in this case concerns whether or not the exclusivity provisions of the North Carolina Worker's Compensation Act would limit the recovery available to the plaintiff to those remedies provided under the Act.[27] The lower courts held that the Act so limited the plaintiff's choice of remedies.[28] The Superior Court, Durham County, allowed summary judgments in favor of all the defendants.[29] The court of appeals then affirmed the lower court, holding that the civil claim was barred by the exclusivity provision of the Act, and the plaintiff appealed to the Supreme Court of North Carolina.[30] The court of appeals decision held that the plaintiff could not sue a co-employee, here Morris Rowland, individually in tort where the co-employee was the sole shareholder in the corporation and was the alter ego of the corporate employer, Rowland Utility, thus making the co-employee essentially the employer for purposes of the Act's exclusivity provision.[31] The Supreme Court of North Carolina reversed the court of appeals' decision in part and affirmed it in part.[32] The court af-

21. *Id.*
22. *Id.*
23. *Id.* at 336, 407 S.E.2d at 226.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. Woodson v. Rowland, 92 N.C. App. 38, 373 S.E.2d 674 (1988).
31. *Id.* at 44, 373 S.E.2d at 677-78.
32. *Woodson*, 329 N.C. at 360, 407 S.E.2d at 240.

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firmed the court of appeals' decision insofar as it allowed summary judgments in favor of Pinnacle One, and in favor of Davidson & Jones on claims of negligent hiring and retention.[33] The court reversed the court of appeals insofar as it affirmed the summary judgments of the trial court in favor of Rowland Utility and Morris Rowland, and in favor of Davidson & Jones on the plaintiff's breach of nondelegable duty of safety claim.[34] The court then remanded the case concerning these defendants for further proceedings in accordance with the opinion.[35] The court held that "when an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer.[36] The court further held that such conduct is tantamount to an intentional tort and any civil actions based on such conduct are not barred by the exclusivity provisions of the Act.[37] The court reasoned that the plaintiff need not choose between her claim under the Act and her civil action because "the evidence tended to show that: (1)Sprouse's death was the result of both an "accident" under the Act and an intentional tort; and (2) the Act's exclusivity provision does not shield the employer from civil liability for an intentional tort."[38] The court further held that there may be only one recovery in order to prevent double redress for a single wrong.[39]

BACKGROUND

The issue of concern here is whether the family of an injured employee may bring a civil action against the employer to recover damages for the death or injury of the employee, and simultaneously pursue a claim for compensation under the Act.[40] N.C. GEN. STAT. § 97-10.1 is referred to as an "exclusivity provision,"[41] which

33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 340-41, 407 S.E.2d at 228.
37. *Id.* at 341, 407 S.E.2d at 228.
38. *Id.* at 337, 407 S.E.2d at 226.
39. *Id.*
40. *Id.* at 334, 407 S.E.2d at 224.
41. Barrino v. Radiator Specialty Co., 315 N.C. 500, 506, 340 S.E.2d 295, 299 (1986); N.C. GEN. STAT. § 97-10.1 (1985) provides:

If the employee and the employer are subject to and have complied with

has been commented upon by other writers.[42] North Carolina courts have held that N.C. GEN. STAT. § 97-10.1 is designed to carry out the purpose of the Act, which is to provide limited benefits to an employee for injury by an accident arising out of and in the course of employment, regardless of negligence or fault on the part of the employer and at the same time to limit the liability of the employer, depriving the employee of certain rights he had at common law.[43] However, the Act does not limit any common law right of the employee, even as against the employer, which pertains to the employee as a member of the general public, disconnected with the employment.[44] In a recent case, this court held that the plaintiff's remedies under the Act were exclusive and that an employee was precluded from filing an independent negligence action against the employer because the employee had already recovered under the Act.[45] North Carolina courts have enforced the exclusivity provision in other cases.[46] Exclusivity clauses of this nature have been held to be constitutional under both the equal protec-

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the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies of the employee, his dependents, next of kin, or personal representative as against the employer at common law or otherwise on account of such injury or death.

42. 2A ARTHUR LARSON, *THE LAW OF WORKERS' COMPENSATION* [hereinafter LARSON] § 65.14, at 12-15, states:

> The operative fact in establishing exclusiveness is that of actual coverage, not of election to claim compensation in a particular case. Even if the employee himself has never made application for compensation, his right to sue his employer at common law is barred by the existence of the compensation remedy.

LARSON § 65.11, at 12-1 states:

> Once a workers' compensation act has become applicable either through compulsion or election, it affords the exclusive remedy for injury by the employee or his dependents against the employer and insurance carrier. This is part of the quid pro quo in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, he is relieved of the prospect of large damage verdicts.

43. Brown v. Motor Inns of Carolina, Inc., 47 N.C. App. 118, 266 S.E.2d 849 (1980); Bryant v. Dougherty, 267 N.C. 540, 148 S.E.2d 553 (1966).

44. *Bryant*, 267 N.C. 548, 148 S.E.2d 551 (1966); Barber v. Minge's, 223 N.C. 216, 25 S.E.2d 839 (1943).

45. Freeman v. SCM Corp., 311 N.C. 294, 316 S.E.2d 81 (1984).

46. Hicks v. Guilford County, 267 N.C. 364, 148 S.E.2d 240 (1966); *Bryant*, 267 N.C. 545, 148 S.E.2d 548 (1966); Wesley v. Lea, 252 N.C. 540, 114 S.E.2d 350 (1960); Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886 (1953).

tion and due process clauses of the Federal Constitution.[47] Professor Larson has commented on the apparent harshness of this rule under workers' compensation acts, and notes:

> If these decisions seem rather strict, one must remind oneself that what is being tested here is not the gravity or depravity of the employer's conduct, but rather the narrow issue of intentional versus accidental quality of the precise event producing injury. The intentional removal of a safety device or toleration of a dangerous condition may or may not set the stage for an accidental injury later. But in any normal use of the words, it cannot be said, if such an injury does happen, that this was deliberate infliction of harm comparable to an intentional left jab to the chin.[48]

The test of liability rests on a consideration of the work connection versus fault.[49] According to Larson, "[t]he right to compensation depends on one simple test: Was there a work-connected injury?"[50] Larson also states that "negligence, and, for the most part, fault, are not in issue and cannot affect the result."[51]

In order to understand how *Woodson* has changed the application of the exclusivity provision in North Carolina, it is necessary to look at the history of the provision's use in North Carolina. The exclusivity provision has been used to forbid the simultaneous pursuit of civil actions and workers' compensation claims against the employer, for injuries to the employee incurred in the course of employment.[52] However, there is an exception to the bar of the exclusivity provision in relation to the employer's liability. The employee is allowed to bring a civil action against the employer when his injuries are the result of the deliberate, intentional actions of the employer.[53]

The North Carolina Supreme Court has also applied the exclusivity provision to limit the remedies available to employees injured by co-employees. The supreme court ruled that an employee, injured during the course of employment, is foreclosed from suing

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47. LARSON, *supra* note 42, § 65.20.

48. *Id.* § 68.13, at 13-45.

49. *Id.* § 2.10, at 5.

50. *Id.*

51. *Id.*

52. Pleasant v. Johnson, 312 N.C. 710, 325 S.E.2d 244 (1985).

53. Warner v. Leder, 234 N.C. 727, 69 S.E.2d 6 (1942); Essick v. Lexington, 232 N.C. 200, 60 S.E.2d 106 (1950). *See* LARSON, *supra* note 42, §§ 65.11 and 65.14.

a co-employee whose negligence caused the injury.[54] However, there are times when an employee may bring a civil action to recover for his injuries during the course of his employment. Under N.C. GEN. STAT. § 97-10.2, an employee may sue third parties who are strangers to the employment.[55] Also, the Supreme Court of North Carolina has intimated that an employee may sue a co-employee where the co-employee acted with the intent to injure him.[56] In a court of appeals case, it was held that an intentional tort amounting to an assault by a co-employee removes the co-employee from the immunity of the Act.[57] This latter option was extended in *Pleasant v. Johnson* to include claims against co-employees when the employee is injured by the willful, wanton, and reckless negligence of the co-employee. *Pleasant* overruled earlier cases which required actual intent by the co-employee to injure the employee.[58]

The court in *Pleasant* specifically noted that it did not decide whether an employer may be sued in a civil action for his willful, wanton and reckless negligence.[59] However, the court in *Pleasant* did hold that allowing a suit by an employee against his employer for gross, willful and wanton negligence, would skew the balance of interests inherent in the Act.[60] In *Barrino v. Radiator Specialty Co.*, the court stated that, although *Pleasant* overruled the court's prior holdings in *Wesley v. Lea*, and *Warner v. Leder*, regarding suits against employees for willful and wanton negligence, the holding of those cases pertaining to the liability of employers still

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54. Strickland v. King, 293 N.C. 731, 239 S.E.2d 243 (1977); Altman v. Sanders, 267 N.C. 158, 148 S.E.2d 21 (1966); Warner v. Leder, 234 N.C. 727, 69 S.E.2d 6 (1952). N.C. GEN. STAT. § 97-10.1; N.C. GEN. STAT. § 97-9 (1985) provides:

> Every employer subject to the compensation provisions of this Article shall secure the payment of compensation to his employees in the manner hereinafter provided; and while such security remains in force, he or those conducting his business shall only be liable to any employee for personal injury or death by accident to the extent and manner herein specified.

55. Jackson v. Bobbitt, 253 N.C. 670, 117 S.E.2d 806 (1961); *Warner*, 234 N.C. 727, 69 S.E.2d 6 (1952).

56. Wesley v. Lea, 252 N.C. 540, 114 S.E.2d 350 (1960); *Warner*, 234 N.C. 727, 69 S.E.2d 6 (1942).

57. Andrews v. Peters, 55 N.C. App. 124, 284 S.E.2d 748 (1981); *disc. rev. denied*, 305 N.C. 395, 290 S.E.2d 364 (1982).

58. Pleasant v. Johnson, 312 N.C. 710, 325 S.E.2d 244 (1985).

59. *Pleasant*, 312 N.C. at 717, 325 S.E.2d at 250.

60. *Id.*

remained, in that "[t]he acceptance of benefits under the Act forecloses the right of the employee to maintain a common law action . . . against the employer . . . . "[61] In the past, the exclusivity provision barred both compensatory and punitive damages.[62]

In the case at hand, the supreme court has once again widened the scope of an employee's remedies and has overruled the *Barrino* case, which refused to allow an employee to bring a civil action against his employer.[63] Today, when an employer knows that his conduct is substantially certain to result in injury or death to an employee, such conduct is tantamount to an intentional tort and the employee may bring a civil action against the employer although the injury or death is covered by the Act and there is present compliance with the Act.[64] A plaintiff will not be required to chose between a workers' compensation claim and a civil action, but will be allowed to pursue them simultaneously.[65]

ANALYSIS

In *Woodson*, the court held that the evidence tended to show that the employee's death was the result of intentional conduct by the employer, which the employer knew was substantially certain to cause injury.[66] Next, the court concluded that this conduct was tantamount to an intentional tort.[67] The court then held that the plaintiff could pursue her workers' compensation claim and her civil action simultaneously.[68] The employee did not have to elect between them because the evidence tended to show that the employee's death was the result of both an "accident" under the Act and an intentional tort and because the Act's exclusivity provision does not shield the employer from civil liability for an intentional tort.[69] However, the plaintiff is entitled to only one recovery, and thus may not receive a double recovery under both the workers'

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61. Barrino v. Radiator Specialty Co., 315 N.C. 500, 513, 340 S.E.2d 295, 303 (1986).

62. LARSON, *supra* note 44, § 65.37, at 12-36. *See also Barrino*, 315 N.C. 500, 340 S.E.2d 295 (holding a claim for punitive damages is also subject to the bar of the exclusivity provision).

63. Woodson v. Rowland, 329 N.C. 334, 349, 407 S.E.2d 224, 233 (1991).

64. *Woodson*, 329 N.C. at 340-41, 407 S.E.2d at 228.

65. *Id.* at 341, 407 S.E.2d at 228.

66. *Id.* at 337, 407 S.E.2d at 226.

67. *Id.*

68. *Id.*

69. *Id.*

compensation claim and the civil action.[70]

The court began its analysis with the statutory construction principle which ensures that the purpose of the legislature is given effect.[71] The court recognized that the Act tries to balance competing interests of employers and employees and to implement trade-offs between them.[72] It provides the employee with certain recovery without having to prove that the employer was negligent in the face of affirmative defenses such as the fellow servant rule and contributory negligence.[73] In return, the Act limits the liability of the employer by limiting the amount of recovery available to the employee for work-related injuries and removes the employee's right to pursue a civil action, which might result in larger damages awards.[74] However, the court did not find that the legislature intended to relieve employers of civil liability for intentional torts resulting in injury or death of employees.[75] The court held that "[i]n such cases, the injury or death is considered to be both by accident, for which the employee or personal representative may pursue a compensation claim under the Act, and the result of an intentional tort, for which a civil action against the employer may be maintained."[76]

The court adopted Prosser's definition of intent which extends "not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what the actor does."[77] Under general concepts of tort liability, one who intentionally engages in conduct with the knowledge that certain results are substantially certain to occur, is held to intend the results for purposes of tort liability.[78] This is a higher threshold for civil recovery against employers than co-employees

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70. *Id.*

71. *Id.* at 338, 407 S.E.2d at 227; Elec. Supply Co. v. Swain Electrical Co., 328 N.C. 651, 403 S.E.2d 291 (1991).

72. *Woodson*, 329 N.C. at 338, 407 S.E.2d at 227.

73. Pleasant v. Johnson, 312 N.C. 710, 325 S.E.2d 244 (1985).

74. *Id.* at 712, 325 S.E.2d at 246-47 (citing 1 ARTHUR LARSON, THE LAW OF WORKERS' COMPENSATION § 2.20 (1984)).

75. *Woodson*, 329 N.C. at 338-39, 407 S.E.2d at 227.

76. *Id.* at 339, 407 S.E.2d at 227.

77. *Id.* at 340, 407 S.E.2d at 229; WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 8A (4th ed. 1971). *Accord* RESTATEMENT (SECOND) OF TORTS § 8 (4th ed. 1971) and WILLLIAM L. PROSSER AND ARTHUR KEETON ON TORTS § 8, at 35 (5th ed. 1984).

78. *Woodson*, 329 N.C. at 340, 407 S.E.2d at 229; RESTATEMENT (SECOND) OF TORTS § 8A and cmt. b (1965).

because co-employees, unlike employers, do not finance or otherwise directly participate in workers' compensation programs.[79] The court concluded that "[t]he substantial certainty standard satisfies the Act's purposes of providing trade-offs to competing interests and balancing these interests, while serving as a deterrent to intentional wrongdoing and promoting safety in the workplace."[80] The court went on to analyze the issue according to the holdings of several other jurisdictions which had considered how egregious the employer's misconduct must be to justify civil recovery from the employer.[81] The court found that both the courts and legislatures in a fair number of other jurisdictions do not require actual intent to harm for an employer's conduct to be actionable in tort and outside the protection of the exclusivity provisions of workers' compensation.[82]

The court applied the substantial certainty standard to the facts of the case and concluded that the following factors all converge to make the plaintiff's evidence sufficient to survive summary judgment: (1) Morris Rowland's knowledge and disregard of the dangers associated with trenching itself; (2) his presence at the site with adequate opportunity to discover such hazards; (3) his direction to his employees to proceed with the work in the absence of the required safety procedures; (4) the opinion of the foreman for Davidson & Jones, that the trench was unsafe; and (5) a scientific soil analysis by agronomist James Rees, submitted by the plaintiff in an affidavit on the status of the soil where the cave-in occurred which stated that the trench "had an exceedingly high probability of failure, and the trench was substantially certain to fail."[83] The court determined that Morris Rowland could be held individually liable along with Rowland Utility, because corporate officers are treated the same as their corporate employer for application of the exclusivity principle.[84] The court concluded that Rowland Utility's liability is dependent on the actions of Morris Rowland under concepts of agency relationship under the doctrine of respondeat superior and thus the motion of Morris Rowland for

79. *Woodson*, 329 N.C. at 342, 407 S.E.2d 229; N.C. GEN. STAT. § 97-93 (1985).

80. *Woodson*, 329 N.C. at 342, 407 S.E.2d at 229; N.C. GEN. STAT. § 95-126(b)(2) (1985).

81. *Woodson*, 329 N.C. at 342-44, 407 S.E.2d at 229-30.

82. *Id.*

83. *Id.* at 344-46, 407 S.E.2d 231-32.

84. *Id.* at 347-48, 407 S.E.2d at 232-33.

summary judgment should also be denied.[85]

The court went on to explain its reasons for allowing the plaintiff to pursue her workers' compensation claim because the injury to the decedent was the result of an "accident" as used under the Act.[86] "Accident" under the Act means "(1) an unlooked for and untoward event which is not expected or designed by the injured employee; (2) a result produced by a fortuitous cause."[87] Employees certainly do not expect to be injured from the intentional torts of their employer while on the job, and therefore such injuries are "unlooked for and untoward events."[88] Thus, the employee is allowed to treat such injuries as accidental under the Act and may accept the benefits of workers' compensation.[89] Therefore, there is no inherent inconsistency in the plaintiff's pursuit of a civil action and a workers' compensation claim.[90]

According to Larson, inherent inconsistency is one of the essential elements of an election of remedies defense for the employer.[91] Since an inherent inconsistency is lacking, the doctrine of election of remedies does not require the plaintiff to chose between the common law and statutory remedies.[92] The court then overruled prior cases which held that simultaneous pursuit of a civil action and a workers' compensation claim is not allowed.[93]

In this case there was no election of remedies problem as presented in *Barrino*, because the plaintiff received no benefits under the Act while she pursued her civil suit.[94] A worker is entitled to only one recovery in order to prevent double redress for a

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85. *Id.*

86. *Id.* at 348, 407 S.E.2d at 233.

87. *Id.* at 348, 407 S.E.2d at 233; Harding v. Thomas & Howard Co., 256 N.C. 427, 428, 1124 S.E.2d 109, 110-11 (1962); *see* Rhinehart v. Market, 271 N.C. 586, 157 S.E.2d 1 (1967).

88. *Woodson*, 329 N.C. at 233, 407 S.E.2d at 348; *Harding*, 256 N.C. at 428, 134 S.E.2d at 110-11.

89. *Woodson*, 329 N.C. at 233, 407 S.E.2d at 348; *See* Pleasant v. Johnson, 312 N.C. 710, 325 S.E.2d 244 (1985) and cases cited therein; Warner v. Leder, 234 N.C. 727, 69 S.E.2d 6 (1952); Andrews v. Peters, 55 N.C. App. 124, 284 S.E.2d 748 (1981), *disc. rev. denied*, 305 N.C. 395, 290 S.E.2d 364 (1982) (cited with approval in *Pleasant*).

90. Barrino v. Radiator Specialty Co., 315 N.C. 500, 522, 340 S.E.2d 295, 308 (1986) (Martin, J., dissenting).

91. *Id.*

92. *Id.*

93. *Woodson*, 329 N.C. at 349, 407 S.E.2d at 233.

94. *Id.* at 348, 407 S.E.2d at 233.

single wrong, which is the goal of the election doctrine.[95] Also, double recovery can be avoided by requiring an employee to reimburse the workers' compensation carrier to the extent of benefits paid to the employee or by reducing the plaintiff's recovery in tort by the amount already received, if he recovers against his employer in a civil action.[96]

The court went on to support its result as a more equitable one than forcing an employee injured by the intentional misconduct of his employer to elect a common law claim and to forgo his workers' compensation claim.[97] An injured employee with financial difficulties may have no real alternative other than accepting workers' compensation benefits giving up his tort claim, without making any real choice between one remedy or the other.[98] The doctrine of election of remedies presupposes a "choice" between remedies.[99] An employee who is in severe economic straits and makes a decision based on the exigencies of his immediate situation cannot be said to have freely "chosen" one remedy over another.[100] Also, such a policy under the election of remedies doctrine would not discourage intentional misconduct by employers.[101] After *Woodson*, the plaintiff does not have to prove that the employer intended that a particular employee would be the victim, or that death, or some other particular harm, would result.[102] It is enough for there to be a substantial certainty that the employers' actions would cause injury or death.[103]

The dissent in *Woodson* disagreed with the majority's holding that the exclusivity provision of the Act does not apply, and that the plaintiff may recover in a civil action against the employer for conduct substantially certain to cause injury to an employee.[104] However, the dissent conceded that the majority's holding repre-

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95. *Id.* at 349, 407 S.E.2d at 233. *See also* Smith v. Oil Corp., 239 N.C. 360, 79 S.E.2d 880 (1964) (holding that allowing worker to pursue both remedies does not run afoul of goal of election doctrine, which is to prevent double redress of a single wrong).

96. *Woodson*, 329 N.C. at 349, 407 S.E.2d at 233.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Barrino v. Radiator Specialty Co.*, 315 N.C. 500, 522, 340 S.E.2d 295, 308 (1986) (Martin, J., dissenting).

101. *Woodson*, 329 N.C. at 349, 407 S.E.2d at 233.

102. *See also* Fallis v. Ins. Co., 247 N.C. 72, 100 S.E.2d 214 (1957).

103. *Woodson*, 329 N.C. at 340-41, 407 S.E.2d at 228.

104. *Id.* at 362, 407 S.E.2d at 241.

sented both reasonable and desirable social policy.[105] Still, the dissent agreed with the court of appeals' decision, which quoted *Pleasant*, stating that "[c]hanges in the Act's delicate balance of interests is more properly a legislative prerogative than a judicial function."[106] The dissent claimed that allowing an employee to bring a civil action against the employer for even gross, willful and wanton negligence, would upset the balance of interests between employers and employees under the Act.[107]

The court should be concerned with the deterrence of intentional employer conduct which is likely to endanger the lives and safety of workers.[108] We should not allow an employer to assume that the Act will insulate him from liability no matter how egregious and deliberate his misconduct.[109] To do so would be to contradict the policy of the legislature in promoting worker safety.[110] To allow an employer to insure himself against liability for intentional torts would be to encourage him to weigh the costs of safety against the costs of workers' compensation insurance and to choose the most cost-efficient course of conduct.[111] Such a policy would not discourage intentional misconduct by employers.[112] Also, the court has held that an insured cannot protect himself from liability for his intentional or criminal wrongs through insurance.[113] Furthermore, there is no inherent inconsistency in a plaintiff's effort to recover for the intentional misconduct of the employer and compensation under the Act.[114] As the court reasoned, the same conduct may be both the result of intentional conduct and an accident under the Act.[115] The North Carolina Court of Appeals in *Daniels v. Swofford*, held that "[a]n unexpected assault may be considered an accident despite its characterization as an intentional tort."[116] The laws of North Carolina have provided the employee with both

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105. *Id.*

106. Woodson v. Rowland, 92 N.C. App. 38, 42, 373 S.E.2d 674, 677. *See generally* Pleasant v. Johnson, 312 N.C. 710, 325 S.E.2d 244 (1985).

107. *Woodson*, 92 N.C. App. at 42, 373 S.E.2d at 674.

108. Barrino v. Radiator Specialty Co., 315 N.C. 500, 519, 340 S.E.2d 295, 306 (1986) (Martin, J., dissenting).

109. *Id.*

110. *Id.*; N.C. GEN. STAT. § 95-126(b)(2) (1981).

111. *Barrino*, 315 N.C. at 519, 340 S.E.2d at 306 (Martin, J., dissenting)..

112. Woodson v. Rowland, 329 N.C. 334, 349, 407 S.E.2d 224, 233.

113. Blackwell v. Ins. Co., 234 N.C. 559, 67 S.E.2d 750 (1951).

114. *Barrino*, 315 N.C. at 519, 340 S.E.2d at 306 (Martin, J., dissenting).

115. *Id.*

116. Daniels v. Swofford, 55 N.C. App. 555, 558, 286 S.E.2d 582, 584 (1982).

a common law and a statutory remedy, and the employee is not forced to make a choice between the two.[117]

CONCLUSION

After *Woodson*, the family of an injured employee may bring a civil action against the employer to recover damages for the death or injury of the employee, although coverage and compliance under the Act exist. The court in *Woodson* refused to follow previous case law which held that simultaneous pursuit of a civil action and workers' compensation is not allowed. The holding in *Woodson* is perhaps the most reasonable and desirable social policy for anyone who agrees that the employer should be fully liable for intentional misconduct which results in injury or death to employees.

Debbie Collins

117. *Barrino*, 315 N.C. at 522, 340 S.E.2d at 308 (Martin, J., dissenting).